Kentucky Law Journal

Volume 53 | Issue 4 Article 2

1965

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Introduction

This paper deals with the role of tobacco and smoking in the causation of lung cancer and other diseases and whether a cause of action exists for injuries sustained as a result of using tobacco products. The burden of establishing a causal connection between cancer or other illnesses and the defendant's wrongful act has always presented a difficult obstacle to the injured plaintiff. But today with the advent of the Surgeon General's Report,[1] it appears that there will be few problems in establishing this causal connection to the extent of sending the question to the civil jury. But causation is only the first step in awarding damages to a plaintiff in such a law suit. He must also clear the additional hurdles of selecting a theory to rely upon, whether it be negligence, implied warranty, express warranty, misrepresentation, or some other theory; the problem of lack of privity between the consumer and the manufacturer; and whether the consumer assumes the risk by using tobacco known to be harmful or in some way is contributorily negligent. This topic affects many people today. It was reported that in 1955, 68 per cent of the male population and 32.4 per cent of the female population 18 years of age and over were regular smokers of cigarettes.[2] This means that nearly 70 million people in the United States now consume tobacco regularly,[3] and most of this is in cigarettes. In 1910 cigarette consumption per person 15 years or older was

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[1] Advisory Committee to the Surgeon General of the Public Health Service, Report on Smoking and Health (1964) [hereinafter cited as Surgeon General's Report].

[2] Current Population Survey (1955).

[3] Surgeon General's Report 26.

138 per year, this rose to 1,365 in 1930; 1,828 in 1940; to 3,322 in 1950; and to 3,986 in 1961. At the same time, per capita consumption of tobacco in other ways has gone down. Thus, per capita consumption of cigars declined from 117 in 1920 to 55 in 1962; pipe tobacco consumption fell from 2½ pounds per person in 1910 to one-half pound in 1962; and use of chewing tobacco has declined from four pounds per person in 1900 to half a pound in 1962.[4] These statistics on overall tobacco usage for the last 50 years means that if a close link in causation between tobacco and illnesses is found and recovery is available under the remedies in the courts of law, then a great area of prospective recovery may soon be opening up.

Causation

The causal link between tobacco consumption and cancer or other illnesses has been suspected for a few years, but no report on this matter affected the general public to the extent that the SURGEON GENERAL'S REPORT did when it was released to the American people in January of 1964. The sale of tobacco in forms other than cigarettes increased[5] while cigarette sales decreased, at least for a short duration; cigarette manufacturers' stocks went plummeting on the New York Stock Exchange; and the cigarette industry announced the appointment of an administrator to act as a czar to enforce a cigarette advertising code with tight restrictions.[6] This, however, was not the first indication of the causal connection between cancer and other illnesses and smoking cigarettes. Therefore the history of other findings and reports will be explored before the SURGEON GENERAL'S REPORT is analyzed.

During the past fifty years total death rates have declined rapidly.[7] But lung cancer is a very striking exception. After adjusting for differences in age distribution, that is, a comparison is made only between persons of the same age for different periods (*e.g.*, the rates of those between the ages of 50-60 in 1900

[4] *Ibid.*

[5] This probably was due to the conclusion that while cigarette smokers had a mortality rate about 70 per cent higher that that for non-smokers, cigar smokers, at least those who smoked less than five per day, and pipe smokers had about the same death rates as the non-smoker. See Surgeon General's Report 108-112.

[6] Washington Post, April 28, 1964, p. 1, col. 3.

[7] Hammond, *The Effects of Smoking*, 207 Scientific American 3, 4 (July 1962).

must be compared with those between the same years in 1960, since today there would be many more in advanced ages, who should normally have a greater mortality rate than persons of lesser age), it was found that deaths from lung cancer in the United States have increased 600 per cent among men and 125 per cent among women.[8] Deaths from lung cancer for the past several years has ben the principal form of fatal cancer among men.[9] The figures without adjusting for age differences were, of course, even more startling: 400 deaths in the United States in 1935; 11,000 deaths in 1945; and 36,000 deaths in 1960, all from lung cancer.

In the late 1940's a number of investigators became concerned with this increase in lung cancer and attempted to find out the cause for it. It was already well known that this disease could result from prolonged and heavy occupational exposure to industrial dusts and vapors and this was the same type of lung cancer which was increasing at such an alarming rate—epidermoid carcinoma and undifferentiated carcinoma (as distinguished from adenocarcinoma, in which the diseased cells assume an arrangement resembling that of the cells in a gland).[10] The studies therefore began to relate the cancer to some sort of contamination, including industrial fumes and smoking of cigarettes, cigars, and pipes. Their study had come about ninety years after the first observation of this causal relationship between tobaco and cancer by M. Bouisson, an obscure French physician, who in 1859 noted that of 68 patients of his with cancer of the buccal cavity (45 of the lip, 11 of the mouth, 7 of the tongue, and 5 of the tonsil) 66 smoked pipes, one chewed tobacco and one used tobacco in some form. He also observed that cancer of the lower lip ordinarily developed at the point where the pipe was held in the mouth, and lip cancer occurred more frequently among individuals who smoked short-stemmed pipes than those who smoked long-stemmed pipes or used stems which did not conduct heat. He concluded that cancer resulted from irritation of the tissue by tobacco and heat.[11]

These investigators in the 1940's also took note of the declara-

[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Id.* at 3.

tions of two New Orleans surgeons, Drs. Alton Ochsner and Michael E. DeBakey, that there was a causal connection between the phenomena of the increase in lung cancer and a general rise in cigarette smoking.[12] These men had observed that nearly all their lung cancer patients were cigarette smokers. Raymond Pearl, John Hopkins medical statistician, in 1938 concurred in the opinion of the New Orleans surgeons when he reported that smokers had a far shorter life expectancy than those who did not use tobacco.[13] This was followed by the results of the first experimental evidence for an association between tobacco and cancer when Dr. A. H. Roffo of Argentina painted the backs of rabbits with tobacco extracts and produced cancer.[14]

But like so many others in science, these investigators were not completely convinced of the causal relationship between cancer and tobacco, so they compiled their own statistics and in many cases employed a different "prospective" method of study. That is, they questioned apparently healthy individuals and followed them before they became sick rather than making "retrospective" studies of people selected only because they already had certain illnesses.[15] Their findings were very similar—they definitely found that lung cancer was related to tobacco smoke inhalation and that there was a definite association between cigarette smoking and coronary diseases, gastric and duodenal ulcers, certain diseases of the arteries, pulmonary diseases, cancer of the bladder, cirrhosis of the liver, and other types of cancer.[16] One of the more interesting studies was that made by Dr. Wynder[17] when he found that Seventh-Day Ad-

[12] Ochsner & DeBakey, *Primary Pulmonary Malignancy, Symposium on Cancer*, 68 Surg. Gynec. Obstet. 435 (1939).

[13] Hammond, *supra* note 7, at 3.

[14] Roffo, *Cancerizacion Gastrica por Inqestion de Alquitran Tabaquico*, 18 Bol. Inst. Med. Exp. Estud. Cancer Buenos Aires 39 (1941).

[15] See Hammond, *supra* note 7, at 5.

[16] See Doll & Hill, *Lung Cancer and Other Causes of Death in Relation to Smoking*, 2 Brit. Med. J. 1071 (1956); Dorn, *Tobacco Consumption and Mortality from Cancer and Other Diseases*, 74 Public Health Rep. 581 (1959); Hammond, *supra* note 7; Hammond & Horn, *Smoking and Death Rates—Report on Forty-Four Months of Follow-up of 187,783 Men*, 166 J.A.M.A. 1159, 1294 (1958). See also Dunn, Lunden & Breslow, *Lung Cancer Mortality Experience of Men in Certain Occupations in California*, 50 Amer. J. Public Health 1475 (1960). One of the earlier studies on the relationship between smoking and coronary artery disease was made at the Mayo Clinic in 1940. See English, Willius & Berkson, *Tobacco and Coronary Disease*, 115 J.A.M.A. 1327 (1940).

[17] Wynder, Lemon & Bross, *Cancer and Coronary Artery Disease Among Seventh-Day Adventists*, 12 Cancer 1016 (1959).

ventists had a much lesser death rate than the general population in lung cancer and coronary disease. During the same period this religious group, which believes in total abstention from alcohol and tobacco, had about the same mortality rate as that of the general population in other diseases, including cancer in areas other than the lungs, mouth, larynx, and esophagus.

These studies and others[18] invoked the Surgeon General of the Public Health Service to call together 155 expert consultants, with a nucleus committee of ten, to meet between November 1962 and December 1963 in order to review and evaluate both the new and older data and, in addition, if possible, to reach some definitive conclusions on the relationship between smoking and health in general. The conclusion of these experts was as follows:

1. Lung Cancer

Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction. The risk of developing lung cancer increases with duration of smoking and the number of cigarettes smoked per day, and is diminished by discontinued smoking. The risk of developing lung cancer for the combined group of pipe smokers and cigar smokers is greater than for non-smokers, but much less than that for cigarette smokers.

2. Bronchitis and Emphysema

Cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis and emphysema. A relationship exists between cigarette smoking and emphysema but it has not been established that the relationship is causal. Studies demonstrate that fatalities from this disease are infrequent among non-smokers.

3. Coronary Artery Disease

Male cigarette smokers have a higher death rate from coronary artery disease than non-smoking males, but it is not clear that the association has causal significance.

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[18] For a more complete analysis of all the past studies, see the various tables in the Surgeon General's Report.

4. Other Cancer

Pipe smoking appears to be causally related to lip cancer. Cigarette smoking is a significant factor in the causation of cancer of the larynx. The evidence supports the belief that an association exists between tobacco use and cancer of the esophagus, and between cigarette smoking and cancer of the urinary bladder in men, but the data are not adequate to decide whether these relationships are causal. Data on an association between smoking and cancer of the stomach are contradictory and incomplete.

5. Other Diseases

Epidemiological studies indicate an association between cigarette smoking and peptic ulcer which is greater for gastric than for duodenal ulcer. Tobacco amblyopia (dimness of vision unexplained by an organic lesion) has been related to pipe and cigar smoking by clinical impressions. The association has not been substantiated by epidemiological or experimental studies. Increased mortality of smokers from cirrhosis of the liver has been shown in the prospective studies. The data are not sufficient to support a direct or causal association.[19]

The Committee went into further study to link smoking to other diseases but could conclude nothing from it. Its "judgment in brief" came out with a resounding conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[20] It therefore definitely linked smoking with lung cancer and with other diseases to a lesser extent.

Of course there will be those who disagree with the decision of the Committee. Before the report came out there were many who did not approve of the way the surveys were conducted[21] and others, including the Tobacco Industry Research Committee, who felt that no conclusions could yet be reached from the evidence, especially since many smokers go all through life

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[19] Surgeon General's Report 31-40.

[20] *Id.* at 33.

[21] See the testimony given by Drs. Harry S. N. Greene and Ian MacDonald on July 25, 1957, and by Dr. R. H. Rigdon on July 19, 1957, before the *Subcommittee on Legal and Monetary Affairs, Committee on Government Operations, United States House of Representatives.*

without incurring lung cancer.[22] It remains to be seen, however, whether these critics will continue their doubt now that the report has been released to the public by the Surgeon General.

Theories of Action

Once the plaintiff in an action for injuries or wrongful death leaps over the hurdle of causation, he then encounters the tremendous problem of what theory of action to proceed under. As will be seen from a review of the cases in this field, it is a rare and courageous plaintiff who goes into court with only one theory of action in his complaint. The "shotgun" approach will probably continue until there is a much broader base of decisions in this field so that the plaintiff will know that his cause of action is the only one of merit that he can pursue.

A. Negligence

1. Proceeding Under Negligence

In *Pritchard v. Liggett & Myers Tobacco Co.*,[23] the defendant won at the trial level when the court granted the motion to dismiss the breach of warranty count at the close of plaintiff's evidence and granted the motion for directed verdict on the remaining negligence count at the end of all the evidence. The Third Circuit in remanding held that both theories of action should have been presented to the jury, and noted that under Pennsylvania law a supplier of products who knows or should know that the "forseeable use is dangerous to human life unless certain precautions are taken" and who realizes or should realize that the user will not in the exercise of reasonable vigilance recognize the danger, is under a duty to warn the user of such consequence and to advise proper precautions.[24] The plaintiff had offered testimony of physicians that the producer was aware or should have been aware of the dangers involved. Plaintiff's cause of action was based on the fact that he had to have a lung removed in 1953 due to cancer, and he alleged this cancer was the result of smoking Chesterfield cigarettes between 1921 and

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[22] See, *e.g.*, Russ, Smoking and Its Effects (1959).

[23] 295 F.2d 292 (3d Cir. 1961), 50 Calif. L. Rev. 566 (1962), 15 Vand. L. Rev. 1019 (1962).

[24] *Id.* at 299.

1953. The expert testimony then related that the cigarette manufacturer should have been aware that there were dangerous properties in the cigarettes and, as a consequence, had a duty to warn the buyer. The gist of the experts' testimony was that knowledge of the connection between smoking and epidermoid cancer was being disseminated many years prior to 1953. One even stated that literature on the relationship between smoking and cancer was available fifty years ago.[25]

The appellate court noted that during the time the plaintiff was using the cigarettes the defendant conducted only one test to determine the effects of smoking Chesterfields on the nose, throat and accessory organs, and that this test was inconclusive. The court held that this evidence was enough to require that the jury decide whether it was reasonable for the defendant not to have conducted different or additional tests to determine the harmfulness of the product.

This, so far, is one of three cases reported in which the plaintiff has succeeded in getting a negligence claim against a tobacco manufacturer sent to the jury. In *Green v. American Tobacco Co.*[26] the plaintiff proceeded under six theories of liability, which were reduced to two at the close of plaintiff's evidence: breach of implied warranty and negligence. The defendant moved at the close of all the evidence for a directed verdict. The court reserved its decision on this and submitted it to the jury, which returned with a general verdict for the defendant. The jury also answered in special interrogatories that although the decedent in this wrongful death action had died of cancer of the lung and that this had been proximately caused by smoking Lucky Strike cigarettes, the defendant could not have known, prior to February 1, 1956, that users of its product would be in danger of contracting lung cancer by the inhalation of the smoke. Of course, it is not known at this time whether the trial judge would have rendered a judgment notwithstanding the verdict had the jury in with a different result, so this case is not nearly as strong as *Pritchard* in finding that the cause of action for negligence should be a jury question in cases of this sort.

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[25] *Id.* at 300.
[26] 304 F.2d 70 (5th Cir. 1962), 61 Mich. L. Rev. 1180 (1963).

Another similar case is *Lartique v. R. J. Reynolds Tobacco Co.*[27] where the plaintiff sued for the wrongful death of her husband, basing her claim on breach of warranty and negligence. In this action two cigarette manufacturers (Liggett and Myers Tobacco Company and R. J. Reynolds Tobacco Company) were joined as the defendants because the decedent had smoked both Picayune and Camel cigarettes. The court instructed the jury in a hybrid instruction concerning both negligence and warranty.[28] The result was a general verdict for the defendant, and the case was affirmed on appeal. Plaintiffs appealed primarily on the ground that the charge to the jury on implied warranty was so interspersed with principles of negligence as to be misleading. Since no material mention of the instruction on negligence was made on appeal, this case is not very useful in deciding whether (in cancer cases) the question on negligence is one for the jury.

In *Cooper v. R. J. Reynolds Tobacco Co.*[29] the plaintiff began with a multiplicity of theories but had such a difficult time with presenting a proper complaint that his original grounds were reduced to two, negligence and deceit, and those were in turn reduced to deceit by the time the plaintiff had finished with the problems inherent in the complaint. The result was a summary judgment for the defendant, but might have been something else had the plaintiff's lawyer proceeded under another theory.

In *Ross v. Philip Morris Co.*[30] plaintiff's lawyer made the same fatal mistake in failing to comply with procedural rules in his complaint. The original complaint alleged negligence, willful misrepresentation, breach of warranty, and violation of certain state statutes, but these were finally reduced to one count by the time the plaintiff finished amending his complaint. This last theory was one for breach of warranty, which was not then actionable in Missouri between those not in privity of contract. Luckily, however, the plaintiff retained other counsel and got a third amended complaint grounded not only on warranty but on negligence and fraud and deceit as well. Thus, when the trial

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[27] 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963), 30 Brooklyn L. Rev. 155 (1963).

[28] *Id.* at 23-24.

[29] 256 F.2d 464 (1st Cir. 1958) (per curiam), *cert. denied*, 358 U.S. 875 (1958).

[30] 164 F. Supp. 683 (W.D. Mo. 1958), *aff'd*, 328 F.2d 3 (8th Cir. 1964).

court granted summary judgment on the warranty issue, the plaintiff still had the other counts left. The final result was adverse to the plaintiff, but at least the attorney still had been able to get it to the jury after part of the complaint was lost.

With *Pritchard* as the leading case declaring that the issue of negligence involving cancer caused by smoking cigarettes is one for the jury, the plaintiff has overcome the first hurdle of being able to present the question to the jury. Of course, that case was decided under Pennsylvania law in a federal suit based on diversity jurisdiction. It is speculative whether other courts will be in accord in deciding that it is a jury question whether the cigarette manufacturer was acting reasonably in not researching the product more or in not warning the consumer. At least one author has agreed that an action for negligence exists, and he has declared four bases for it: (a) failure by the manufacturer to keep abreast of scientific knowledge and developments; (b) failure by the manufacturer to make adequate tests to determine the composition of its product; (c) failure to warn consumers of dangers which the manufacturer knew or should have known about and which are not apparent to a consumer; (d) false assurances of safety made by a manufacturer without any reasonable basis for them, whether or not a warning was required.[31]

2. Negligence and Privity

The problem of privity, though a very genuine one under warranty theory, is not too acute in a negligence approach. If the applicable state substantive law requires privity between parties, the case will be thrown out of court at the outset.[32] But under the historical *MacPherson* rule accepted by the great majority of states, a manufacturer of a product may be liable to the ultimate user, not in privity of contract, "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made."[33] Earlier cases not involving cancer had also recognized that cigarettes come within this

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[31] Rossi, *The Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored*, 34 So. Cal. L. Rev. 399 (1961).

[32] *Cf.* Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958), *aff'd*, 328 F.2d 3 (8th Cir. 1964).

[33] MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

classification and that recovery could be based on negligence without privity.[34] But even further, courts have held that tobacco products, though not food, can be regarded as so analogous to food that they are within the "imminently dangerous to health" category, another exception under the *MacPherson* rule.[35] Of course, most of these involve patent defects in chewing tobacco, which is closely akin to food, whereas in the cancer cases the defect is latent, more debatable and more complex to discover. It seems, however, that a tobacco consumer should be able to collect from the manufacturer without privity, since tobacco is definitely harmful to many users. The court in *Pritchard* seemed to be little concerned with privity and this should become the prevailing rule. However, the plaintiff must always be wary of this problem in suing a producer.[36]

3. Contributory Negligence

Contributory negligence and assumption of risk are very likely problems for the plaintiffs in this field and may be the escape route for the tobacco manufacturers in cases in which the plaintiff has started smoking after the SURGEON GENERAL'S REPORT was released to the public. In all negligence cases generally this defense of contributory negligence or assumption of risk exists. As it now stands, however, most companies have been defending these cases on the ground that in the exercise of reasonable care they still could not have had any knowledge that lung cancer or other harmful results could come from prolonged smoking.[37] They would be highly inconsistent if they then declared that the plaintiff clearly knew of the risk and was contributorily negligent or assumed the risk.

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[34] See Liggett & Myers Tobacco Co. v. DeLape, 109 F.2d 598 (9th Cir. 1940); Meditz v. Ligette & Myers Tobacco Co., 167 Misc. 176, 3 N.Y.S2d 357 (Sup. Ct. 1938).

[35] See, *e.g.*, Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S.W.2d 612 (1932) (worm in chewing tobacco); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) (human toe in chewing tobacco); Foley v. Liggett & Myers Tobacco Co., 136 Misc. 468, 241 N.Y. Supp. 233 (Sup. Ct. 1930), *aff'd*, 232 App. Div. 822, 249 N.Y. Supp. 924 (1931) (mouse fragments in smoking tobacco); Webb v. Brown & Williamson Tobacco Co., 180 S.C. 436, 186 S.E. 383 (1936) (tack in chewing tobacco).

[36] For a more complete analysis of this see Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 Va. L. Rev. 145, 152 (1955). See generally Annot., 75 A.L.R.2d 43 (1961).

[37] See Lartique v. Reynolds Tobacco Co., 317 F.2d 19, *cert. denied*, 375 U.S. 865 (1963); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

If the plaintiff in such a case alleges that the defendant had a duty to warn him of the possible results of smoking, evidence of the plaintiff's conduct should be relevant, but not for purposes of showing contributory negligence. It should only throw light on the adequacy of the warning. Thus, if the plaintiff, having been warned, acts in open defiance of the warning, he should be denied recovery, not on the basis of contributory negligence, but because the plaintiff has been adequately warned.[38] Two leading authorities in the field have declared that to allow such a defense of assumption of risk or contributory negligence in a case where the duty to warn is part of the cause of action is to

> indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.[39]

One court, however, has declared in dictum that the defense might lie in a cigarette-cancer case.[40]

B. Breach of Warranty

1. Warranties of Fitness and Merchantability

Although some courts tend to confuse warranty with negligence,[41] the liability in warranty does not rest upon a showing of negligence.[42] Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier.[43]

In this country, the law of warranty is based on either the Uniform Sales Act, which is a codification of the common law,[44] or on

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[38] See Wright v. Carter Prods., Inc., 244 F.2d 53 (2d Cir. 1957); Dillard & Hart, *supra* note 36, at 163-65.

[39] Dillard & Hart, *supra* note 36, at 163.

[40] See Cooper v. R. J. Reynolds Tobacco Co., 158 F. Supp. 22, 23 (D. Mass. 1957) (dictum); *cf.* O'Connell v. Westinghouse S. Ray Co., 288 N.Y. 486, 41 N.E.2d 177 (1942); Alexander v. Wrenn, 158 Va. 486, 164 S.E. 715 (1932). But see Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964).

[41] *See, e.g.*, Lartique v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied* 375 U.S. 865 (1963).

[42] See George v. Willman, 379 P.2d 103 (Alaska 1963); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[43] Frumer & Friedman, Products Liability § 16.01 (1963).

[44] Ward v. Great A. & P. Tea Co., 231 Mass. 90, 92, 120 N.E. 225, 226 (1918).

the newer law, the Uniform Commercial Code. Under section 15 of the Uniform Sales Act, in every sale:

> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied waranty that the goods shall be reasonably fit for such purpose.
> (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

Although its effect is still uncertain, the Uniform Commercial Code appears to be about the same with a few changes. Whereas § 15(2) above requires a sale by description in order to imply a warranty of merchantability, U.C.C. § 2-314 does not require a description in order to raise an implied warranty but only that the seller is a merchant with respect to goods of that kind. Section 2-314 also spells out the nature of the implied warranty in relation to the representations on the packaging. Another relevant change between the two codes is that in § 15(4) of the Sales Act it is provided that no implied waranty of fitness for a particular purpose arises in the sale of a "specified article under its patent or trade name," but in §§ 2-315, 2-316 of the Uniform Commercial Code, this exception is eliminated and only reliance on the seller's "skill or judgment" is required.

With these laws in effect, one must then go to the pertinent cases in the field to see the applicability of them in the field of injuries sustained through tobacco products. In the original case of *Green v. American Tobacco Co.*[45] the plaintiff in the wrongful death action did not pursue the negligence question on appeal but limited it to the count on breach of implied warranty. Since the jury came back with a verdict under interrogatories that declared smoking of the tobacco company's cigarettes to be the proximate cause of the cancer in the decedent's lungs, the plaintiff felt that he was entitled to judgment as a matter of law under the Florida doctrine of implied warranty. He felt that the

[45] 304 F.2d 70 (5th Cir. 1963), 61 Mich. L. Rev. 1180. This is the original of the *reported* cases. The others may have the title interposed, *i.e.*, American Tobacco Co. v. Green.

court erred when it charged the jury that the implied warranty of fitness in Florida depends upon the ability of the manufacutrer to know about the harmful substances in its product. The jury had answered another interrogatory concerning the forseeability of the harmful substance, and declared that the tobacco company prior to 1956 could not have known that users of Lucky Strike cigarettes through inhalation of the smoke could contract cancer of the lung. It was clear, then, that the factual situation boiled down to whether this doctrine of implied warranty on a product like cigarettes would apply without any forseeability on the part of the manufacturer.

The Fifth Circuit in the original appellate action said, however:

> [W]e are convinced that the doctrine of implied warranty by a manufacturer and seller of the qualities and fitness of the thing sold for the purpose for which it is intended or desired is founded on his superior opportunity to gain knowledge of the product and to form a judgment of its fitness.[46]

This was seriously questioned in a dissenting opinion by Judge Cameron[47] who felt that a warranty for wholesomeness cannot be negated by the manufacturer's saying that reasonable care was exercised in its efforts to achieve the wholesomeness. The majority went on to say that there were three classes of products intended for human consumption in which there is probable application of the doctrine of implied warranty: (1) those generally felt to be wholesome, for example, foods; (2) those known by all to be injurious to some while perhaps beneficial to others, for example, alcoholic beverages; (3) those heretofore thought to be wholesome or pleasurable but which constantly expanding research has now proved or convinced many to be injurious, for example, cigarettes. The court said that liability would attach in the first two classes if the product contained some foreign substance, or was spoiled, or was different in some way from the product that it was supposed to be. Assuming tobacco products to be food, or categorized similarly, an example of this would be the plaintiff who was injured by smoking an exploding cigar.[48]

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[46] 304 F.2d at 73.
[47] 304 F.2d at 77.
[48] Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936); *cf.* Lindner v. Liggett-Myers Tobacco Co., 23 N.Y.S.2d 923 (Sup. Ct. 1940).

Under the third class, it would be up to the jury to decide whether the seller had a superior opportunity to gain knowledge of the product or its source, and, hence, whether the buyer, at the time of purchase, relied on the judgment of the seller. This analysis of the court has been criticized by at least one writer, who has stated that under this doctrine purchasers of thalidomide, for instance, would have no right to recover against the drug manufacturers who had no forseeability of the harmful effects of the drug.[49]

But the Fifth Circuit had some reservations on this case, so it granted the petition for rehearing[50] on the basis that since the case was based on diversity and therefore was founded on Florida law, it should certify the question of law to the Florida supreme court.[51] This was because the court felt that the question had not yet been decided by a Florida court. The result was a holding by the Florida Supreme Court that a cigarette manufacturer is liable for breach of an implied warranty of merchantibility when the smoking of its cigarettes was the proximate cause of cancer, even though the manufacturer could not, by the application of human skill and foresight, have known that its product was harmful.[52] When the Fifth Circuit received this information it reversed and remanded for a new trial with the answers to the interrogatories intact.[53] The primary question at the new trial would be whether, in spite of the fact that the smoking of defendant's cigarettes was the proximate cause of decedent's cancer, the cigarettes were *reasonably* fit and wholesome. Therefore, it rejected the argument of both sides to grant a directed verdict at the appeal on the grounds that there was no issue left to decide and remanded for the court to resolve the question of reasonableness. Judge Cameron, in an opinion concuring in part and dissenting in part,[54] again declared that the manufacturer

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[49] *Cigarettes and Vaccine: Unforseeable Risks in Manufacturers' Liability Under Implied Warranty,* 63 Colum. L. Rev. 515, 529 (1963).

[50] 304 F.2d at 85.

[51] This was pursuant to statutory authority, Fla. Stat. Ann. § 25.031 (Supp. 1962).

[52] Green v. American Tobacco Co., 154 So.2d 169 (Fla. 1963), 52 Geo. L.J. 200 (1963).

[53] Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963), *cert. denied,* 377 U.S. 943 (1964).

[54] 325 F.2d at 679.

should be held absolutely liable, since to hold that the standard of reasonableness should be applied would be to abrogate the very finding of the jury. To Judge Cameron, when the cigarettes were the proximate cause of the cancer it was then decided that they were not reasonably fit and wholesome for use by this particular consumer. The warranty is made to each buyer, not to the "normal" buyer.[55]

To some, this decision by the Fifth Circuit is very similar to saying that the cigarette manufacturers may be liable in negligence.[56] But the same court had said that the application of negligence principles did not belong in implied warranty cases in *Lartique v. R. J. Reynolds Tobacco Co.*[57] The court there applied the idea of forseeability in implied warranty in approving the trial court's charge to the jury. Of course, Louisiana law was used, but that, like Florida's law, is similar to the warranty in the Uniform Sales Act and the Uniform Commercial Code.[58] Therefore, despite the disclaimor by the court, the result in that case was the same as if the principle of negligence had been used, since both hinge on forseeability.

2. Express Warranties

On the question of express warranty, as distinguished from implied warranty, one case has left its mark. In *Pritchard v. Liggett & Myers Tobacco Co.*[59] the court directed that the issue of express warranty should have been presented to the jury. They should have decided whether it was reasonable for the plaintiff to have relied on the advertisements of the tobacco company that "a good cigarette can cause no ills" and "nose, throat and accessory organs not adversely affected by smoking Chesterfield." Here, too, the court held the question of implied warranty of merchantability and negligence should have been a jury issue.

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[55] See Crotty v. Shartenberg's–New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697 (1939).

[56] *Supra* note 49; *cf.* 1 Frumer & Friedman, *op. cit. supra* note 43, § 1603[4].

[57] 317 F.2d 19 (5th Cir. 1963). This holding was approved in Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964).

[58] 317 F.2d at 27. See Parkinson & Saunders, *Implied Warranty in Florida,* 12 U. Fla. L. Rev. 241 (1959).

[59] 295 F.2d 292 (3d Cir. 1961).

3. Warranties and Privity

The question of privity in all of these cases may present many problems. As discussed previously in connection with negligence theories, numerous fictions have eroded the strict concepts of privity as applied in warranty theory, especially in the areas of food and drugs. The Uniform Commercial Code erodes the concept a little further in § 2-318 entitled "Third Party Beneficiaries of Warranties Expressed or Implied." The limited purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer receives in the contract of scale, thereby freeing such beneficiaries from any technical far of privity. It should be noted that while this section expressly extends coverage of warranties, the comments to the section state that beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties to the buyer who resells, extend to other persons in the distribution chain. The Uniform Commercial Code thus seems to turn questions of privity back to the courts for solution on a case-by-case basis.

Privity was a barrier in *Ross v. Philip Morris & Co.*[60] until the appellate court straightened out the district court on the law of privity as applied in Missouri.[61] What had actually happened was that while the appellate court was hearing argument on *Ross* the Missouri supreme court struck down the privity requirement.[62] Because the defendant had prevailed in the lower court in the cigarette-cancer case, the Eighth Circuit did not feel that it was necessary to decide the question of privity in the implied warranty case at hand. However, since it declared that the question was solved by the state court, it seems clear that privity had been laid to rest in the court's mind. In *Cooper v. R. J. Reynolds Tobacco Co.*[63] the absence of privity of contract required the court to deny recovery under Massachusetts law. But the other courts have not had trouble with this issue, and it seems that this question will present less of a problem as time goes by, inasmuch as the courts are leaning toward fewer restrictions in recovery against those who produce consumer goods which

[60] 164 F. Supp. 683 (W.D. Mo. 1958).
[61] Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964).
[62] See Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963).
[63] 234 F.2d 170 (1st Cir. 1956).

prove to be harmful.[64] The leading case in this field is *Henningsen v. Bloomfield Motors, Inc.*,[65] which has applied the *MacPherson* rule of negligence to the cases involving implied warranty. In that case the court refused to confine the privity exception in warranty cases to food and held that in the entire field of consumer products privity should not be required.

C. Misrepresentation

Another theory of recovery upon which the manufacturer may be held liable, is that of misrepresentation.[66] However, no success has come about as yet, so this theory of recovery will probably not develop so long as the theories of negligence and warranty offer greater chances of success. In *Cooper v. R. J. Reynolds*[67] the First Circuit recognized that an action lay for deceit in this field, but the defendant was granted summary judgment when it refuted the plaintiff's claim that she relied on the defendant's advertisements that more doctors smoked Camels than any other cigarettes. The company showed by affidavits that no such advertisements were furnished for publication during the time alleged by the plaintiff, and summary judgment was granted when the plaintiff filed no opposing affidavits.

Several other cases present scanty authority on the subject. In *Ross v. Philip Morris & Co.*[68] the plaintiff abandoned the part of the complaint alleging fraud and deceit after the district court granted summary judgment for the tobacco producer on this issue. There are not enough facts to indicate just what the claim was based upon, but it is probably safe to assume that it was similar to that in the *Cooper* case. In *R. J. Reynolds v. Hudson*[69] the plaintiff brought an action based primarily upon misrepresentation. The defendant moved for summary judgment on the grounds that the claim was barred because the action was filed too late. This was denied by the trial court and upheld by the Fifth Circuit. The result was an implication that the theory of misrepresentation was a valid claim and could very well be

[64] For a more complete analysis of this problem see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). See also Frumer & Friedman, *op. cit. supra* note 43, § 16.03; 27 Mo. L. Rev. 194 (1962).
[65] 32 N.J. 358, 161 A.2d 69 (1960).
[66] See, *e.g.*, Wright v. Carter Prods., Inc., 244 F.2d 53 (2d. Cir. 1957).
[67] 256 F.2d 464 (1st Cir.), *cert. denied*, 358 U.S. 857 (1958).
[68] 328 F.2d 3 (8th Cir. 1964).
[69] 314 F.2d 776 (5th Cir. 1963).

presented to the jury if the plaintiff could prove his allegations. Also in the *Pritchard* case[70] there was no claim based on deceit as such, but the case was based on the theory of express warranty, which was essentially misrepresentation. The plaintiff alleged that the tobacco company advertised that Chesterfields were pure and could cause no ills. The issue was presented to the jury on the warranty issue, but not on misrepresentation.

Thus, although misrepresentation by itself has not been sufficient to create manufacturer's liability, it must be remembered that it relates directly to the expressed and implied warranty provisions discussed previously and can be used therefore to supplement those theories.

Conclusion

With the release to the public of the SURGEON GENERAL'S REPORT, and with all the experts' opinions, it seems clear that with the proper expert testimony the plaintiff in a personal injury suit against a tobacco company for injuries caused by using tobacco products may very well prevail. The problem of causation was an extremely tough hurdle a few years ago, but testimony today is readily available to show causation. Once this problem is solved, the plaintiff must next make his decision regarding the theory of action. The successful choice of the proper cause of action will depend in large part upon state law. For example, if the state law in such a diversity action (or it might be a case in a state court) holds that a strict privity requirement will bar a negligence or warranty suit against the tobacco company, then the plaintiff's greatest problem will be to get the jurisdiction to adopt the more liberal and modern view of *MacPherson* and *Henningsen* to allow recovery in consumer products cases. If he cannot succeed in this his only choice is to use other remedies, the best of which appears to be that of misrepresentation. That theory has not yet succeeded, however, so the plaintiff must be ready with his proof or else suffer a directed verdict or summary judgment, as the plaintiff did in *Cooper*.

It must be noted here, though, that the chance of recovery in these cases has never been better and the chances will improve as more of these cases are brought before the courts. Causation,

[70] Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1963).

a tremendous hurdle at one time, is almost solved now. Getting the case to the jury was also a difficult problem, especially with the proper instructions. This has been solved, at least in part, by the decisions in *Green* and *Pritchard*, to allow the questions of negligence and warranty to be decided by the jury. It may be that many courts will adopt the rationale of Judge Camerson's dissent in *Green* and decide that once the jury has determined that the illness has been proximately caused by the tobacco product, warranty has been established without the jury having to decide whether the tobacco company was acting reasonably.

The best result for all, it sems, is to allow recovery on an implied warranty, at least where there has been no warning by the manufacturer. If the cigarette companies will place an adequate warning on their packages that prolonged use may result in cancer and other illnesses they could perhaps escape liability under current theories. Query is whether they would be willing to chance the risk of decreased sales by having the warning on the packages. Against that they must weigh the possibility of liability to the consumer for illnesses contracted. The result should be that the producers would be liable if they are not willing to warn the buyer, since they now know from the SURGEON GENERAL'S REPORT that highly qualified experts find a causal connection between use of tobacco and certain illnesses.